82-2040

CASE NO.

in the

Supreme Court

of the

United States

October Term, 1982

KENNETH WARD THOMAS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Howard Hochman
2650 Biscayne Blvd.
Suite 207
Miami, Florida 33137

QUESTION PRESENTED

Does the Confrontation Clause of the Sixth Amendment And Rule 804(b)(5) of the Federal Rules of Evidence Prohibit the introduction into evidence of Grand Jury Testimony when said testimony is the only evidence of Guilt and it contains none of the indicia of reliability as required by *Ohio v. Roberts*, 448 U.S. 56 (1980)

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CITATIONS OF AUTHORITIES (Continued)

CASE NO.

in the Supreme Court of the United States

October Term, 1982

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Kenneth Ward Thomas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 14, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The opinion on the Court of Appeals for the Fourth Circuit was entered on April 14, 1983 and the petition

for certiorari was filed within 60 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

RULE 804(b)(5), FEDERAL RULES OF EVIDENCE

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having the equivalent circumstantial quarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes it known to the adverse party sufficiently in advance of

the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

On February 4, 1981, the petitioner, Kenneth Ward Thomas, was indicted by a Federal Grand Jury for violating the drug laws of the United States.

The arrest of the petitioner occured when the Coast Guard sighted and boarded the vessel Gulf Princess II near the South Carolina coast. The only evidence found on the Gulf Princess II at the time of the boarding was a small amount of marijuana residue on the rail and the scuppers of the vessel.

On April 14, 1981, the petitioner was tried before a jury in the United States District Court for the District of South Carolina. During the course of the trial, the Government introduced the Grand Jury testimony of two witnesses: Gordon Hastings and Kenneth Gorman. Neither of these men were present to testify at trial.

Gordon Hastings' testimony before the Grand Jury placed the petitioner's vessel off the coast of Columbia, South America. Mr. Hastings also testified that the vessel did not appear to be involved in fishing activity during the time that he observed it.

Kenneth Gorman was a crew member of the Gulf Princess II and was with the petitioner throughout the

trip to South America. Originally Gorman had refused to testify before the Grand Jury and even after a grant of immunity he continued to refuse. In an effort to compel his testimony, Gorman was found in contempt and incarcerated on October 8, 1980. On Christmas Eve, 1980 Gorman agreed to testify before the Grand Jury in exchange for immunity and was released.

At the time of trial, the Government was unable to serve process on either Hastings or Gorman and they did not testify at trial. Instead, their testimony before the Grand Jury was read to the jury, over the objections of petitioner's counsel.

This Grand Jury testimony was the only evidence in support of the substantive crimes of the petitioner.

The Government did not argue that the petitioner was in any manner responsible for the nonappearance of these witnesses.

A jury found the petitioner guilty of all counts and the Court of Appeals for the Fourth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. There is a conflict in the decisions of the Circuit Courts of Appeal concerning the introduction of Grand Jury testimony and the standard to be applied under The Confrontation Clause of the Sixth Amendment.

In its opinion in the instant case, the Fourth Circuit determined that the testimony of Hastings and Gorman

did not violate the Sixth Amendment under the standards it had established in its opinions in *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) and *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), Cert. Denied 439 U.S. 936 (1978).

The Sixth Amendment principles established by the Fourth Circuit in *West* and *Garner* have been rejected or seriously questioned by several Circuit Courts throughout the United States.

The path taken by the Fourth Circuit in *West* and *Garner* and now extended in the instant case has so weakened the Sixth Amendment's Confrontation Clause guarantee as to render it ineffective as a Constitutional safeguard from trial by affidavit. Many Circuits have rejected the Fourth Circuit's approach, but certain others find its allure tempting and appear to be ready to follow its lead. As a result, the Confrontation Clause means one thing in certain areas of the country and something else in others.

As early as 1978, certain members of this Court recognized the developing conflict among the Circuits. When this Court denied the petition for certiorari in *United States v. Garner*, 439 U.S. 936 (1978), two members of the Court expressed concern over the conflict that existed at that time. The conflict has not subsided but has increased and the present case has only continued to create conflict.

This conflict and confusion created by the division among the Circuits has compelled some courts to openly request guidance from this court on this important

Constitutional issue. See *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982); *United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978)

Certain Circuits have developed an analysis which permits the admission of Grand Jury testimony if it satisfies both the "circumstantial guarantees of trustworthiness" standard of Rule 804(b)(5) and the "indicia of reliability" requirement of the Confrontation Clause. Even within those circuits that take this approach there is a lack of agreement over the meaning and the application of these terms. Also, some Circuits do not permit the admission of grand jury testimony absent evidence of a waiver by the defendant of his Confrontation Right. See, *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. Carlson*, 658 F.2d 455 (7th Cir. 1981); *United States v. Mastrangelo*, 693 F.2d 269 (2nd Cir. 1982); *United States v. Balano*, 618 F.2d 624 (10th Cir. 1980).

The Fourth Circuit's *West* opinion seems to have determined that the standard of Rule 804(b)(5) and the Confrontation Clause are identical. In the present case, the Fourth Circuit has extended its rationale to the point where all grand jury testimony is admissible as long as the declarant is unavailable. It has determined in this case that since grand jury testimony is given under oath and under the potential threat of prosecution of perjury, it meets the requirements of the Confrontation Clause. No other Circuit Court has been willing to go this far. The Fourth Circuit has demonstrated in this case that it has very few limits to the admission of grand jury testimony.

Many of the Circuit Courts have been highly critical of the Fourth Circuit's approach. The following is typical of the critical comments:

> *United States v. Balano*, 618 F.2d 624, 627 (10th Cir.1980)
>
> We believe, however, that *West* improperly reduces the Confrontation Clause to a mere consideration of evidentiary value . . .
>
> Dispite its recognition of these differences, however, The Fourth Circuit found that 'the same circumstances suffice to meet the requirements of (Rule) 804(b)(5) And of the Confrontation Clause'. We disagree.
>
> *United States v. Thevis*, 665 F.2d 616, 628, 629 (5th Cir. 1982)
>
> We reject both the *West* and *Carlson* approaches to this issue . . .
>
> A more fundamental disagreement with both *West* and *Carlson* is the conclusion in those cases that corroborated grand jury testimony in fact meets the reliability Standard of Rule 804(b)(5).

There is a fundamental disagreement between the Circuits of both the Fourth Circuit's approach to this issue under both Rule 804(b)(5) and the Confrontation Clause.

Notwithstanding the critical comment of the other Circuits and the conflicting interpretations given to *West*, the Fourth Circuit has continually reaffirmed its prior reasoning. See, *United States v. Murphy*, 696 F.2d 282 (4th Cir. 1982). With its decision in the present case, the Fourth Circuit not only reaffirms its previous decisions but carries its dismemberment of the Confrontation Clause further.

As a result of the Fourth Circuit's opinion in the present case, the conflict in the Circuits is not reconciled but is further excerbated by the Fourth Circuit's assumption that *any* and *all* grand jury testimony is admissible so long as the declarant is unavailable. That is the clear reading of the court's decision in this case.

POINT II

The Fourth Circuit's decision in the instant case Conflicts with the Supreme Court's interpretation Of the Confrontation Clause of the Sixth Amendment

Not only does the Fourth Circuit's opinion in this case conflict with other Court of Appeals' Confrontation clause analysis, it also conflicts with the Supreme Court's analysis in *Ohio v. Roberts*, 448 U.S. 56 (1980).

Ohio v. Roberts, involved the admissibility at trial of a witnesses testimony acquired during a preliminary hearing. This court established a two prong approach for determining whether this type of hearsay evidence is admissible over a Confrontation Clause challenge.

First, one must determine if the witness is unavailable. If the witness is unavailable, the next more difficult test must be applied: does the hearsay evidence bear adequate "indicia of reliability". The difficulty lies with determining what is the proper "indicia of reliability".

Notwithstanding the difficulty of this question, one thing is quite clear. This court has never admitted hearsay statements into evidence in a criminal proceeding unless the hearsay fell within a traditional common law exception to the hearsay rule or there existed at the time that the statement was made some right to cross-examination. See, *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149 (1970); *Kirby v. United States*, 174 U.S. 47 (1889); *Pointer v. Texas*, 380 U.S. 400 (1965); *Dutton v. Evans*, 400 U.S. 74 (1970).

In summing up its approach, this court stated:

> ". . . when a hearsay declarant is not present for Cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears an adequate 'indicia of reliability'. Realiability can be inferred without more in a case Where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence *must be excluded*, at least absent a showing of particularized guarantees of trustworthiness."
>
> (Emphasis supplied)

In *Ohio v. Roberts*, this Court made it clear that the right to cross-examination, at some point in the criminal proceedings, is necessary for there to be adequate "indicia of reliability" to admit hearsay evidence when that testimony does not fall within a traditional hearsay exception.

The petitioner does not argue that the right to cross-examination is the only means by which prior recorded testimony may be qualified for admission under the Confrontation Clause when that testimony is admissible under a traditional exception to the hearsay rule. However, in those cases where the hearsay testimony is not admissible under traditional exceptions, (such as grand jury testimony), the "indicia of reliability" test requires some form of cross examination.

The Fourth Circuit's approach to the admissibility of uncross-examined grand jury testimony is a radically different approach than that established by this Court in its prior opinions and as a result the Fourth Circuit is in conflict with this court on an important principle of Federal Constitutional Law.

POINT III

The instant case is an appropriate vehicle for Resolution of this important question.

The instant case represents the furtherest extension by the Fourth Circuit of its *West* rationale. This case clearly confronts the issue of a defendant's Sixth Amendment Confrontation Rights and the admissibility

of grand jury testimony. This case does not contain any of the amelorating facts that might have been present in other cases previously brought before this court. This case represents the clearest example of trial by unexamined hearsay confronted by this court or any other court.

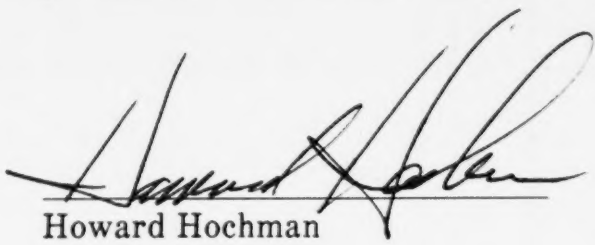
In the present case the defendant did not procure the non-appearance of the witnesses through threat or other means. The grand jury testimony was the only evidence presented at trial that connected the petitioner to the crimes. The petitioner did not have an opportunity to cross examine the witnesses at any time during the criminal proceeding. Kenneth Gorman only testified before the grand jury after spending three months in jail and then only after being granted "Christmas Eve immunity". At trial there was very little corrobative testimony to support the grand jury testimony.

In short, this case is an appropriate case for this court to resolve the conflicts between the Circuits and to establish a workable Sixth Amendment Confrontation Clause analysis.

Respectfully Submitted,

Howard Hochman
2650 Biscayne Blvd.
Suite 207
Miami, Fl. 33137

I hereby certify that a copy of the Petition for Writ of Certiorari was served by United States mail this 10th day of June, 1983 on the Solicitor General of the United States, Department of Justice, Washington, D.C.



Howard Hochman

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 81-5062(L), 81-5139

United States of America,

Appellee,

v.

Kenneth Ward Thomas,

Appellant.

Nos. 81-5063, 81-5140

United States of America,

Appellee,

v.

John David Curtis,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston, Charles E. Simons, Jr., District Judge.

Argued: January 14, 1983 Decided: April 14, 1983

Before PHILLIPS and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Joseph O. Rogers, Jr. (Timothy J. Rogers, Rogers, Riggs & Rogers; John J. Czura on brief) for Appellants; Lionel S. Lofton, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney on brief) for Appellee.

ERVIN, Circuit Judge:

Kenneth Ward Thomas and John David Curtis were convicted on substantive charges of possession and importation of marijuana, and on related conspiracy and aiding and abetting counts, in violation of 21 U.S.C. §§841(a)(1), 846, 925(a), 960, and 963, and 18 U.S.C. §2. They originally were arrested by the Coast Guard while aboard the trawler GULF PRINCESS II off Hilton Head, South Carolina. Thomas was the master of the vessel and Curtis, along with one Kenneth Gorman, comprised the crew. When the vessel was stopped, there were indications that the trawler had not been engaged in fishing: there was neither catch nor ice to preserve a catch. A small quantity of a substance later identified positively as marijuana was found scattered on the deck, on the rails, along the gunnels, and on the bumpers. The stop and arrest were made pursuant to information obtained by the Drug Enforcement Administration that the GULF PRINCESS II was engaged in smuggling drugs from South America to South Carolina.

Pursuant to a grant of immunity, Gorman testified to a federal grand jury that prior to its seizure, the

trawler had sailed to South America and picked up a load of marijuana, which it brought back to South Carolina waters where the marijuana was off-loaded. A commercial fisherman named Gordon Hastings told the grand jury that he encountered the GULF PRINCESS II off the coast of Columbia twenty days before its seizure by the Coast Guard, and that it had not appeared to him to be engaged in fishing or shrimping.

When neither Gorman nor Hastings could be found to testify at the trial of Thomas and Curtis, the district court permitted their grand jury testimony to be introduced. The jury found Thomas and Curtis guilty of all charges in the bills of indictment. On appeal, Thomas and Curtis maintain that their convictions were secured in contravention of the Speedy Trial Act, 18 U.S.C. §3161 *et seq.* (1982), the confrontation clause of the sixth amendment, the federal hearsay rule, and the due process clause of the fifth amendment. We find no reversible error, and affirm.

I.

Thomas and Curtis were arrested on August 30, 1980. The Speedy Trial Act of 1974, as amended in 1979 ("the Act"), required the government, therefore, to secure an indictment by the end of September. *See* 18 U.S.C. §3161(b) (indictment must be filed within thirty days of arrest). The Government failed to do this and instead moved for additional time on October 1, *after* the expiry of the statutory time period. The additional time granted the government pursuant to this motion also ran out on November 12 without an indictment being returned. On November 13, the government once

again sought, and secured, a grant of additional time after the period in which it was required to act had elapsed. On December 2, a federal grand jury indicted Thomas and Curtis, who promptly moved to dismiss the indictment on speedy trial grounds. This motion was granted by the district court without prejudice, and on the same day, February 4, Thomas and Curtis were reindicted.

On appeal, the government apparently challenges the propriety of the dismissal of the original indictment.[1] We need not reach this issue in light of our conclusion that the subsequent indictment was timely, notwithstanding the claim by Thomas and Curtis that the dismissal of the first indictment precluded their reindictment by another grand jury. The Act requires dismissal of untimely indictments, but leaves to the district court's discretion the decision whether to dismiss with or without prejudice. 18 U.S.C. §3162(a)(1). We think that this statutory authority to dismiss an untimely indictment without prejudice necessarily rebuts appellants' argument that the timeliness of any subsequent indictment is to be measured by reference to the original arrest leading to the first, dismissed indictment. This argument leads inexorably to the conclusion that any subsequent reindictment would be untimely, and thereby

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[1]The government suggests that Thomas and Curtis were required to move for dismissal prior to their indictment. The Act clearly recognizes the possibility of a motion to dismiss an indictment as well as one to dismiss a complaint. *See, e.g.*, 18 U.S.C. §3161(d)(1) ("If any indictment or information is dismissed upon motion of the defendant . . ."). By definition such a motion cannot be made *prior* to the return of the indictment. There is no statutory provision making a pre-indictment motion to dismiss the complaint a condition precedent to filing a motion to dismiss the indictment.

renders all dismissals prejudicial in effect. Our reading of the Act is supported by the *Guidelines to the Administration of the Speedy Trial Act* prepared by the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States. The Committee's view is that a new prosecution is not "subject to dismissal on the basis of any failure to comply with the time limits imposed upon the original prosecution." *Guidelines* 68 (as amended August, 1981). *See also United States v. Rabb*, 680 F.2d 294, 297 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 162 (1982) (subsequent timeliness of indictment not measured from date of first arrest or charge); *United States v. Borum*, 544 F.Supp. 170, 172 (D.D.C. 1982) (dismissal of complaint tolls Speedy Trial Act thirty day requirement for indictments).[2] We agree.

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[2]We read appellants' briefs to contain, albeit obscurely, a challenge to the propriety of the district court's decision to make its dismissal of the first indictment without prejudice. The Act requires that

> [i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. §3162(a)(1). As the district court observed in its dismissal order, the offenses charged were serious, the period between arrest and indictment was not egregious, Thomas and Curtis were free on bond, and, at the time of the court's dismissal ruling, they were unable to suggest any real prejudice resulting to them when questioned by the court. In these circumstances, we cannot say that the district court abused its discretion in ordering dismissal without prejudice.

II.

The government's case against Thomas and Curtis rested largely on the testimony of the two men, Gorman and Hastings, who testified before the grand jury but not at trial, but whose grand jury testimony was read into the record before the jury. Neither Gorman nor Hastings could be located at the time of the trial. Thomas and Curtis claim that the government's attempts to locate these key witnesses were perfunctory and insincere and that the grand jury testimony should have been excluded, with the consequent collapse of the government's case. They maintain that its admission violated the rule against hearsay and denied them their sixth amendment right to confront the government's witnesses.

Both the appellants and the government agree that *United States v. West*, 574 F.2d 1131 (4th Cir. 1978), governs this issue. In *West*, this court sustained the admission of the grand jury testimony of a witness who was murdered before the trial. The testimony was admitted pursuant to Federal Rule of Evidence 804(b)(5), which permits the introduction of hearsay if the declarant is unavailable as a witness and the court determines that the hearsay has "circumstantial guarantees of trustworthiness" equivalent to those present in Rule 804's specific exceptions to the prohibition on hearsay (former testimony subject to cross examination, dying declarations, statements against interest, and statements of family history). In *West*, the court found that the temporal proximity of the witness's testimony to the events he saw and the corroboration of his testimony by that of others constituted the necessary "circumstantial

guarantees of trustworthiness." In a companion case, *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. denied*, 439 U.S. 936 (1978), we upheld a conviction based in part on the grand jury testimony of an alleged co-conspirator who refused to testify as a prosecution witness at trial despite an offer of use immunity. We went on in both cases to hold that the evidence thus admissible under the evidentiary rule was also admissible under the sixth amendment.

It is clear from *West* and *Garner* that the grand jury testimony of an unavailable witness may be introduced under certain conditions without violating the Constitution or the Federal Rules of Evidence. Thomas and Curtis maintain, however, that the government's efforts to secure the live testimony of Gorman and Hastings were so perfunctory that the latter cannot fairly be described as unavailable. Rule 804 defines "unavailability as a witness" to include situations where the witness "is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." Fed. R. Evid. 804(a)(5). The question, therefore is whether the government used "reasonable means" to procure the attendance at trial of Gorman and Hastings.

The government maintained direct contact with Hastings, and contact through his lawyer with Gorman, for a considerable part of the period between their testimony before the grand jury and the trial. Hastings assured the Assistant U.S. Attorney that he would keep in touch, while Gorman's lawyer, who had agreed to ensure his availability for the trial, testified that he had no indication Gorman would disappear. After the two men vanished, the government attempted in vain

to locate them by service of process. While these attempts were unavailing, they were not unreasonable. We conclude therefore that the grand jury testimony of Hastings and Gorman was admissible under *West* and *Garner*.[3]

III.

The additional claims of Thomas and Curtis are without merit. The judgment of the district court is

AFFIRMED.

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[3]In considering the government's motion to admit the grand jury testimony of Gorman, the court itself called Gorman's girlfriend, Vanessa Gail Ingles, to testify outside the jury's presence as to his movements and whereabouts after defense counsel objected to the prosecutor's attempt to relate to the court what Ingles would say. The record indicates that Ingles was questioned by the prosecutor rather than by the district judge and that the court then refused to permit cross examination by defense counsel.

This procedure was error. Both parties are entitled freely to cross examine and impeach a court witness. *Estrella-Ortega v. United States*, 423 F.2d 509, 511 (9th Cir. 1970); 2 Wright, *Federal Practice and Procedure: Criminal 2d* §418 (1982). The fact that Ingles was called to testify outside the jury's presence to aid the court in resolving an evidentiary point rather than before the jury on a substantive issue in the case does not affect the defendants' right to question her: the value of adversary cross-examination in ascertaining the truth is as great when the truth to be learned concerns the government's efforts to procure a witness as when it concerns the acts of an accused. However, this error was harmless. The district court's decision to admit the evidence was sustainable even apart from Ingles' rather unenlightening testimony.

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No. 82-2040

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH WARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether admission at petitioner's criminal trial of the grand jury testimony of two witnesses who disappeared prior to trial violated the Confrontation Clause or Fed. R. Evid. 804(b)(5).

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2040

KENNETH WARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 705 F.2d 709.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1983. The petition for a writ of certiorari was filed on June 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner and co-defendant John David Curtis were convicted of conspiracy to import marijuana in violation of 21 U.S.C. 963 (Count 1); conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 (Count 2); importation of marijuana, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2

(Count 3); and possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 4). Petitioner was sentenced to concurrent five-year terms on Counts 1 and 2, and concurrent five-year terms (with 15 years' special parole) on Counts 3 and 4, to run consecutively with the sentence on Counts 1 and 2.

1. The evidence at trial showed that in late August, 1980 the Drug Enforcement Administration made extensive efforts to locate the fishing vessel Gulf Princess II—which it had reason to believe was engaged in marijuana smuggling—off the coast of South Carolina. On August 29, 1980 the boat was sighted off Edisto Island, South Carolina, at 3:11 p.m. by Robert Spraitz, an employee of the National Marine Fishery Service who was flying a plane along the South Carolina coast. Shortly before nightfall Spraitz returned in his plane to the area, but was unable to relocate the boat (Tr. 120-128). The Coast Guard Cutter Cape Knox, arriving at Edisto Island about 8:00 p.m. the same day, was also unable to locate the Gulf Princess. At about 11:00 p.m., however, the Cape Knox made radar contact with the Gulf Princess as she was leaving South Carolina inland waters via St. Helena Sound (*id.* at 143-145).

When the Coast Guard boarding party boarded the Gulf Princess it found no ice, shrimp, or fish in the hold. The hold had been recently washed with Clorox and the crew appeared very tired (*id.* at 184-186). After daylight the next morning the boarding party found marijuana residue scattered along the gunnels on the port side, on the deck, and around the bumpers and fenders. The head of the boarding party testified that "[i]t looked like they may have been tracking it on their feet and got in the bunks with it. It was in the bunks and on the sheets" (*id.* at 184-185). Petitioner himself was stopped in an attempt to sweep marijuana residue overboard (*id.* at 187).

When the Gulf Princess was stopped there were three persons on board: petitioner (the vessel's master) and Kenneth Gorman and John David Curtis (the crew). Gorman testified before the grand jury that petitioner had recruited him for the smuggling venture aboard the Gulf Princess, which left Florida on July 29 or 30, 1980, and arrived off the coast of Colombia, South America some nine days later. While waiting for the pickup, Gorman stated, they met another shrimp boat, and petitioner had a conversation with its captain. Eventually the Gulf Princess took on some 200 bales of marijuana and left, arriving off Edisto Island, South Carolina eight or nine days later. There they shrimped for several days, and on the evening of August 29, 1980 entered St. Helena Sound, where they were led by a small boat to the site where the marijuana was unloaded. The Gulf Princess then headed out St. Helena Sound and was intercepted and boarded by the Coast Guard. (Tr. 281-297.)

Gordon Hastings, a commercial fisherman and captain of another shrimpboat, also testified before the grand jury that on August 10, 1980 he met the Gulf Princess II off the coast of Colombia near Riohacha. He said that the vessel had no shrimping permit, and that the hold area where shrimp are stored was open. Hastings testified that he spoke for some 30-40 minutes with the captain of the Gulf Princess, whom he later identified from a photo spread as petitioner.[1] He said that the vessel left the coast of Colombia around the 15th or 16th of August. (Tr. 309-319.)

2. Before trial the government moved to read into the record the grand jury testimony of Gorman and Hastings. The government asserted that it had maintained direct contact with Hastings and contact with Gorman through his

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[1]DEA Special Agent Charles Shamming testified at trial that he had shown Hastings the photo spread, and that Hastings had identified petitioner as the captain of the Gulf Princess II (Tr. 336-339).

lawyer for much of the period between the grand jury and trial. Despite numerous efforts to subpoena both men for trial, however, the government was unable to locate them.

After reviewing the transcripts and hearing testimony from a Deputy United States Marshal, a DEA agent, Gorman's girlfriend, and his attorney, the district court found that the government had made a reasonable effort to obtain the presence of the two witnesses (Tr. 75), and that they were "unavailable" within the meaning of Fed. R. Evid. 804(b)(5). The court also concluded that the transcripts were reliable and trustworthy, and hence admissible under Rule 804(b)(5) and the Confrontation Clause. In determining trustworthiness, the court noted that both statements were given under oath, that neither witness had recanted his testimony, and that the testimonies corroborated each other even though Hastings was an innocent party and Gorman was an active participant (Tr. 77-80).

3. The court of appeals affirmed (Pet. App. 1-8). The court agreed that the grand jury testimony was properly admitted under Rule 804(b)(5) and the Confrontation Clause. It held that the government had used "reasonable means" to procure the attendance at trial of Gorman and Hastings (Pet. App. 7).

ARGUMENT

1. Petitioner claims (Pet. 4-8) that the court of appeals' decision in this case conflicts with decisions in other circuits concerning the admissibility of grand jury testimony by witnesses who are unavailable at trial. This claim is without merit.

Petitioner correctly notes (Pet. 6) that in a number of cases grand jury testimony has been admitted because the defendant, through coercion, prevented the witness from

testifying at trial.[2] In such cases the simple explanation for the admissibility of the grand jury testimony is that the defendant has waived his rights under the Confrontation Clause and, a fortiori, his objections to the admission of hearsay evidence.

In numerous other situations, however, similar testimony has been admitted even absent a showing of coercion. This Court has repeatedly declined review.[3] The predicate for admissibility in these situations—under both the Rules of Evidence (Fed. R. Evid. 804(b) ("the declarant is unavailable")) and the Confrontation Clause (*Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) ("the prosecution must * * * demonstrate the unavailability of[] the declarant"))—is that the declarant has died, unaccountably disappeared, or refused to repeat his earlier testimony. Even then, however, admissibility under both the Constitution and the Rules is contingent on a showing that the grand jury testimony bears certain " 'indicia of reliability' " (*Ohio* v. *Roberts, supra*, 448 U.S. at 66) or, stated differently, contains "circumstantial guarantees of trustworthiness" (Fed. R. Evid. 804(b)(5)).

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[2]See *United States* v. *Mastrangelo*, 693 F.2d 269 (2d Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Balano*, 618 F.2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).

[3]See, *e.g.*, *United States* v. *Murphy*, 696 F.2d 282 (4th Cir. 1982), cert. denied, No. 82-6300 (May 23, 1983); *United States* v. *Garner*, 574 F.2d 1141 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Barlow*, 693 F.2d 954 (6th Cir. 1982), cert. denied, No. 82-6408 (May 23, 1983); *United States* v. *Boulahanis*, 677 F.2d 586 (7th Cir. 1982), cert. denied, No. 82-263 (Nov. 15, 1982). See also *United States* v. *Thomas*, 705 F.2d 709 (4th Cir. 1983), petition for cert. pending, No. 82-2040 (filed June 11, 1983); *United States* v. *West*, 574 F.2d 1131 (4th Cir. 1978); *Tolbert* v. *Jago*, 607 F.2d 753 (6th Cir. 1979), cert. denied, 444 U.S. 1022 (1980); *United States* v. *Medico*, 557 F.2d 309 (2d Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ward*, 552 F.2d 1080 (5th Cir.), cert. denied, 434 U.S. 850 (1977).

Not all grand jury testimony can satisfy these rigorous standards; the issue must necessarily be disposed of on a case-by-case basis. The courts of appeals have subscribed to that approach, and none has rejected all grand jury testimony as unreliable.[4] The court of appeals' decision in this case that Gorman's and Hastings' grand jury testimony was sufficiently reliable to warrant its admission is fully in accord with this consensus. Review of that fact-bound determination by this Court is not warranted.

It is important to recognize at the outset that Gorman's and Hastings' testimony before the grand jury was given under oath, and subject to penalties of perjury. Contrast *United States* v. *Ward, supra; United States* v. *Medico, supra; Steele* v. *Taylor,* 684 F.2d 1193 (6th Cir. 1982). Both men also testified on the basis of personal knowledge about events in which they had participated, and there was little likelihood of either misperception or faulty recollection. *Dutton* v. *Evans,* 400 U.S. 74, 88-89 (1970); *United States* v. *Barlow, supra,* 693 F.2d at 962. Hastings, who

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[4]Compare *United States* v. *Gonzalez,* 559 F.2d 1271 (5th Cir. 1977); *United States* v. *Fiore,* 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973), with cases cited in note 3, *supra.* In *United States* v. *Gonzalez, supra,* the court of appeals held a grand jury witness's testimony to be inadmissible under Rule 804(b)(5) when the witness refused to testify at trial. Unlike this case, however, there the court found that the witness's testimony was not corroborated by other independent evidence, and that the witness had been extremely reluctant to testify before the grand jury. 559 F.2d at 1272-1274. Although the court in *United States* v. *Fiore, supra,* held that the government had improperly used grand jury testimony at trial, the case was decided before the enactment of the Federal Rules of Evidence and the decision of this Court in *Ohio* v. *Roberts, supra,* and perhaps for that reason made no inquiry into the question of reliability.

In both *United States* v. *Thevis, supra* note 2, and *United States* v. *Balano, supra* note 2, relied on by petitioner (Pet. 7), the courts of appeals held that the grand jury testimony of an unavailable witness was admissible.

identified petitioner from a photo spread, was an entirely disinterested witness. *United States* v. *Boulahanis, supra,* 677 F.2d at 588-589. The two stories, given by people who had no apparent connection with one another, were consistent in their details about petitioner's conversation with Hastings, the time spent off the coast of Colombia, the fact that the Gulf Princess was not engaged in shrimping, and so on. More important, the testimony of each was corroborated by independent evidence introduced at trial. DEA Special Agent Charles Shamming verified Hastings' identification of petitioner from the photo spread. Gorman's more damaging testimony about the marijuana cargo was not only verified, but made virtually incontestable, by the marijuana residue that covered the vessel from bunks to fenders. His description of the delivery from Edisto Island to St. Helena Sound was corroborated by the testimony of Robert Spraitz and those aboard the Cape Knox. Cf. *United States* v. *West, supra,* 574 F.2d at 1135; *United States* v. *Garner, supra,* 574 F.2d at 1144-1146; *United States* v. *Murphy, supra,* 696 F.2d at 286; *United States* v. *Barlow, supra,* 693 F.2d at 962, 964-965; *United States* v. *Boulahanis, supra,* 677 F.2d at 588-589.

2. Petitioner also claims (Pet. 8-10) that the court of appeals' decision in this case is inconsistent with this Court's decisions interpreting the Confrontation Clause. According to petitioner, those cases establish a requirement that unless out-of-court statements fit "under a traditional exception to the hearsay rule," they are not admissible unless they have been subjected to "some form of cross examination" (Pet. 10). This contention is without merit.

It is true, as this Court has pointed out, that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " *Ohio* v. *Roberts, supra,* 448 U.S. at 66 & n.8. It is also true that

this Court has upheld the admission of out-of-court statements when the declarant was unavailable at trial because prior cross-examination has satisfied the Confrontation Clause's concern about reliability. *Id.* at 72-73; *California* v. *Green,* 399 U.S. 149, 165-168 (1970). But it is not a necessary condition of admissibility that prior testimony fit neatly into one or the other of those two categories. On the contrary, the test laid down by this Court is that hearsay

> is admissible only if it bears adequate "*indicia of reliability.*" Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent *a showing of particularized guarantees of trustworthiness.*

Ohio v. *Roberts, supra,* 448 U.S. at 66 (emphasis added).

As already explained, the testimony in this case satisfies the "reliability" and "trustworthiness" demands of both the Confrontation Clause and Fed. R. Evid. 804(b)(5). It might be argued that satisfaction of the Rule's requirements does little to advance the constitutional inquiry, since Rule 804(b)(5) is not a "firmly rooted hearsay exception." But the issue is not significantly different from that presented in *Dutton* v. *Evans, supra.* There the question was the admissibility of a hearsay statement made by one Williams to a fellow prisoner on returning to the penitentiary from his arraignment. The trial court admitted the statement under a state co-conspirator exception that was, as this Court "readily conceded," more liberal than the corresponding federal rule (400 U.S. at 81). This Court nevertheless upheld the admission of Williams' statement, in large part because it found "indicia of reliability" quite apart from the statement's conformity with a hearsay exception (*id.* at 88-89).

We do not contend that all statements made before a grand jury are, without more, sufficiently reliable to satisfy the demands of the Confrontation Clause. Instead, as the courts of appeals have recognized, the decision about reliability—and hence admissibility—is necessarily a factual one whose outcome will differ from case to case. There can be little doubt, however, that in this case the constitutional requirements elucidated by this Court were satisfied.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

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